INDEX

	Page
Opinion below	1
Jurisdiction	1
Questions presented	2
Statutes involved	2
Statement	2
Summary of argument	6
Argument	7
I. The nine-month duration-of-marriage requirement does not deny appellees due process of law	7
A. The statute rationally promotes a valid legislative goal and does not invidiously discriminate against any class	7
B. The "conclusive presumption" analysis should not be extended to classifications under the Social Security Act	12
C. The statutes at issue here are not unconstitutional under this Court's "conclusive presumption" decisions	15
II. This suit is barred by sovereign immunity insofar as it seeks retroactive benefits	16
III. Any decision invalidating the duration-of-marriage requirement should be given only prospective effect	19
IV. Class action issues	21
Conclusion	23
Appendix	25

566-535—74——1

Cases:

	Page
Beale v. *Blount*, 461 F. 2d 1133	17
Chevron Oil Co. v. *Huson*, 404 U.S. 97	7, 19, 20
Chicot County Drainage District v. *Baxter State Bank*, 308 U.S. 371	19
Cleveland Board of Education v. *LaFleur*, 414 U.S. 632	5, 12
Cotter Corporation v. *Seaborg*, 370 F. 2d 686	17
Dugan v. *Rank*, 372 U.S. 609	16
Edelman v. *Jordan*, 415 U.S. 651	6, 18, 19, 20–21
Eisen v. *Carlisle & Jacquelin*, 417 U.S. 156	21
Flemming v. *Nestor*, 363 U.S. 603	6, 7, 14
Hagler v. *Finch*, 451 F. 2d 45, certiorari denied, 405 U.S. 1071	10
Hawaii v. *Gordon*, 373 U.S. 57	16–17
Jefferson v. *Hackney*, 406 U.S. 535	15
Jimenez v. *Weinberger*, No. 72–6609, decided June 19, 1974	8, 20
Land v. *Dollar*, 330 U.S. 731	16
Larson v. *Domestic & Foreign Commerce Corp.*, 337 U.S. 682	17, 18
Malone v. *Bowdoin*, 369 U.S. 643	17
North American Co. v. *Securities and Exchange Commission*, 327 U.S. 686	14
Richardson v. *Belcher*, 404 U.S. 78	6, 8
Richardson v. *Morris*, 409 U.S. 464	17
Richardson v. *Perales*, 402 U.S. 389	16
Rothstein v. *Wyman*, 467 F. 2d 226, certiorari denied, 411 U.S. 921	20, 21
Stanley v. *Illinois*, 405 U.S. 645	5, 12
Stanton v. *Weinberger*, 502 F. 2d 315	10
United States Department of Agriculture v. *Murry*, 413 U.S. 508	12
Vlandis v. *Kline*, 412 U.S. 441	5, 6, 12, 13, 16

Constitution, statutes and rule:

	Page
United States Constitution:	
Fifth Amendment	2, 4, 5, 7, 8, 17
Eleventh Amendment	18, 19
Social Security Act, Title II, 49 Stat. 622, as amended and added, 42 U.S.C. 401 *et seq.*:	
42 U.S.C. 402	14
42 U.S.C. 402(b)(1)	11
42 U.S.C. 402(e)(1)	11
42 U.S.C. 402(g)(1)	11
42 U.S.C. 405(g)	7, 17, 22, 25–26
42 U.S.C. 405(h)	4, 17, 26
42 U.S.C. 416(b)	13
42 U.S.C. 416(c)	3, 13, 27
42 U.S.C. 416(c)(5)	1, 2, 5, 7, 25
42 U.S.C. (Supp. II) 416(e)	3, 13, 27–29
42 U.S.C. (Supp. II) 416(e)(2)	1, 2, 5, 7, 28
42 U.S.C. 416(f)	13
42 U.S.C. 416(g)	13
42 U.S.C. (Supp. II) 416(k)	3, 16, 29–30
Social Security Act Amendments of 1939, 53 Stat. 1360 *et seq*	8
Section 209(j)	9
Section 209(k)	9
28 U.S.C. 1331	4, 17
28 U.S.C. 1343(1)	17
28 U.S.C. 1361	17
28 U.S.C. 2282	4
28 U.S.C. 2284	4
Rule 23, Fed. R. Civ. P	21

Miscellaneous:

	Page
A Report of the Social Security Board, H. Doc. No. 110, 76th Cong., 1st Sess.	11
3 Davis, *Administrative Law Treatise*, § 27.02, p. 548 (1958 ed.)	19
Final Report of the Advisory Council on Social Security (1938)	8
Hearings before the House Committee on Ways and Means, on Social Security, 76th Cong., 1st Sess.	8
H. Rep. No. 92–231, 92d Cong., 2d Sess.	9
H. Rep. No. 728, 76th Cong., 1st Sess.	11
H. Rep. No. 2526, 79th Cong., 2d Sess.	9
S. Rep. No. 734, 76th Cong., 1st Sess.	11
S. Rep. No. 1862, 79th Cong., 2d Sess.	9

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-214

CASPAR WEINBERGER, SECRETARY OF HEALTH, EDUCATION, AND WELFARE; UNITED STATES DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE; FERNANDO E. C. DE BACA, DIRECTOR OF REGION NINE OF UNITED STATES DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE; JOHN F. RICHARDSON, COMMISSIONER OF REGION NINE OF THE SOCIAL SECURITY ADMINISTRATION; SOCIAL SECURITY ADMINISTRATION, APPELLANTS

v.

CONCETTA SALFI AND DOREEN A. KALNINS

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

BRIEF FOR THE APPELLANTS

OPINION BELOW

The opinion and order of the district court (J.S. App. pp. 1a-8a) are reported at 373 F. Supp. 961.

JURISDICTION

The judgment of the district court, which held unconstitutional 42 U.S.C. 416 (c)(5) and (e)(2), was entered on April 16, 1974 (J.S. App. pp. 9a-11a).

A timely motion for reconsideration was denied on May 9, 1974 (*id.* at p. 12a). A notice of appeal to this Court was filed on May 15, 1974 (*id.* at pp. 19a–20a). On November 11, 1974, this Court noted probable jurisdiction. The jurisdiction of this Court is conferred by 28 U.S.C. 1252 and 1253.

QUESTIONS PRESENTED

1. Whether the duration-of-marriage requirement in 42 U.S.C. 416(c)(5) and 42 U.S.C. (Supp. II) 416(e)(2) violates the Due Process Clause of the Fifth Amendment.

2. Whether sovereign immunity bars this suit insofar as it seeks retroactive social security benefits.

3. Whether, insofar as this suit seeks retroactive benefits, in certifying this suit as a class action, the district court improperly placed the burden of notifying members of the class upon the government rather than upon the plaintiffs.

STATUTES INVOLVED

The statutes involved are reproduced in the Appendix, *infra*, pp. 25–30.

STATEMENT

This case involves the constitutionality of provisions of the Social Security Act that define the circumstances under which widows and children qualify for monthly survivors benefits under Title II of the Act. The specific provisions challenged here, 42 U.S.C. 416(c)(5) and (e)(2), provide that a surviving wife of a deceased wage earner who does not otherwise

satisfy the statutory conditions of eligibility [1] may qualify for benefits if "she was married to [the wage earner] for a period of not less than nine months immediately prior to the day on which he died," [2] and that a surviving child who fails to satisfy other eligibility requirements may qualify if he or she had been a stepchild of the wage earner for at least nine months prior to the wage earner's death.[3]

The facts in this case are not in dispute. On May 27, 1972, appellee Concetta Salfi married Londo L. Salfi,

[1] The surviving wife of a deceased wage earner can qualify for benefits without regard to the duration-of-marriage requirement if (1) she is the mother of his child, (2) she legally adopted his minor child during their marriage, (3) he legally adopted her minor child during their marriage, (4) they legally adopted a minor child during their marriage, or (5) she was or would have been entitled to certain benefits upon application in the month prior to their marriage. 42 U.S.C. 416(c).

[2] The surviving wife also is eligible for benefits if the Secretary of Health, Education, and Welfare determines that the wage earner could reasonably have been expected to live nine months at the time of the marriage, and (1) his death was either accidental or in the line of active military duty, or (2) in the case of the surviving wife's remarriage to the same wage earner after a divorce, the previous marriage lasted for at least nine months. 42 U.S.C. (Supp. II) 416(k). That subsection also defines an accidental death as one which results exclusively from bodily injuries caused "solely through violent, external, and accidental means" where the death occurs no more than three months after the accident.

[3] The surviving child also qualifies for benefits if he or she was the child or legally adopted child of the deceased wage earner or his spouse, 42 U.S.C. 416(e), or, if he or she was the stepchild of the wage earner, in those circumstances where 42 U.S.C. 416(k) would qualify a surviving wife. See note 2, *supra*.

a wage earner fully insured under the Social Security Act (App. 19). On November 21, 1972, less than six months after the marriage, Londo L. Salfi died from a heart attack (App. 16). Appellee Concetta Salfi on behalf of herself and Doreen Kalnins, her daughter from a prior marriage, filed for mother's and child's insurance benefits on the account of Londo L. Salfi. The Secretary denied the applications initially and upon reconsideration because the applicants did not satisfy the statutory standard of eligibility for "widow" and "child," respectively, since Londo Salfi had died from natural causes less than nine months after the marriage.

Appellees then commenced this suit alleging that the nine-month duration-of-marriage requirement was a "conclusive presumption" which denied them due process of law in violation of the Fifth Amendment. The suit was brought as a class action seeking declaratory and injunctive relief and retroactive benefits. A three-judge court convened pursuant to 28 U.S.C. 2282 and 2284, denied the government's motion to dismiss, which asserted, *inter alia,* that the court was without jurisdiction because 42 U.S.C. 405(h) specifically precluded review under 28 U.S.C. 1331, and that sovereign immunity barred the suit.

On cross-motions for summary judgment, the court held that the nine-month duration-of-marriage requirement created a "conclusive presumption" that a marriage lasting fewer than nine months before the wage earner's death was entered into "for the purpose of securing Social Security benefits to which the par-

ties to the marriage would not otherwise be entitled" (J.S. App. p. 6a). Relying on this Court's recent decisions in *Cleveland Board of Education* v. *LaFleur,* 414 U.S. 632, *Vlandis* v. *Kline,* 412 U.S. 441, and *Stanley* v. *Illinois,* 405 U.S. 645, the court held that this presumption violated the Due Process Clause of the Fifth Amendment "insofar as [it denied] plaintiffs an opportunity to demonstrate their eligibility for mother's insurance benefits and child's insurance benefits" (J.S. App. p. 7a).

Although appellees had brought this action as a class suit, the district court took no action with respect to the class until it granted appellees' motion for summary judgment. The court then certified the class as consisting of "all otherwise eligible surviving spouses and stepchildren of deceased wage earners heretofore disqualified from receipt of widow's and children's Social Security Survivors' benefits by operation of 42 U.S.C. §§ 416(c)(5) and (e)(2)" (J.S. App. p. 7a). It ordered the Secretary to notify all members of the class and to provide them benefits from the time of original entitlement. These retroactive benefits are estimated by the Social Security Administration to aggregate approximately $35 million.[4]

[4] The Social Security Administration has reached this estimate on the assumption that the retroactive benefits ordered by the district court extend only back to 1967, when the duration-of-marriage requirement was reduced from twelve to nine months. If the district court order for retroactive benefits includes all individuals denied benefits under the twelve month provision—which was enacted in 1939—the Social Security Administration estimates that the total amount of benefits would exceed $100 million.

566-535—74——2

SUMMARY OF ARGUMENT

The district court erred in holding that the duration-of-marriage provision embodies a conclusive presumption violative of due process. The conclusive presumption doctrine should not be extended to classifications under the Social Security Act since this Court has consistently held that provisions of that Act violate due process "only if the statute manifests a patently arbitrary classification, utterly lacking in rational justification." *Flemming* v. *Nestor,* 363 U.S. 603, 611; *Richardson* v. *Belcher,* 404 U.S. 78.

The duration-of-marriage requirement is rationally related to a legitimate goal—the protection of the limited resources of the Social Security Trust Fund against claims arising from relationships formed for the purpose of obtaining benefits—and does not arbitrarily discriminate against any class.

Even assuming that the conclusive presumption doctrine is applicable to Social Security Act classifications, the duration-of-marriage provision is not unconstitutional. The duration-of-marriage provision is a prophylactic rule which avoids a traditionally disfavored intrusion into protected areas of marital privacy and a "reasonable alternative means of making the crucial determination" (*Vlandis* v. *Kline,* 412 U.S. 441, 452) does not exist.

The district court also erred in awarding retroactive benefits. An award of retroactive benefits is tantamount to an award of money damages and is barred by the doctrine of sovereign immunity. *Edelman* v. *Jordan,* 415 U.S. 651. The only congressional waiver of sovereign immunity applicable to claims

under the Social Security Act is 42 U.S.C. 405(g). That provision, which requires exhaustion of administrative remedies and the filing of suit within 60 days after a final denial of a claim by the Secretary, was not complied with in this case.

Finally, if this Court determines that the duration-of-marriage requirement is unconstitutional and that an award of retroactive benefits is not barred by sovereign immunity, we urge, under the tests of *Chevron Oil Co.* v. *Huson,* 404 U.S. 97, that the decision be given only prospective effect.

ARGUMENT

I. THE NINE-MONTH DURATION-OF-MARRIAGE REQUIREMENT DOES NOT DENY APPELLEES DUE PROCESS OF LAW

A. *The Statute Rationally Promotes A Valid Legislative Goal and Does Not Invidiously Discriminate Against Any Class.*

The sole issue regarding the constitutionality of the statute is whether the nine-month duration-of-marriage requirement of 42 U.S.C. 416(c)(5) and (e)(2) is consistent with the Fifth Amendment's Due Process Clause. In *Flemming* v. *Nestor,* 363 U.S. 603, 611, this Court announced the standard for determining the constitutionality of statutory classifications under the Social Security Act:

> Particularly where we deal with a withholding of a noncontractual benefit under a social welfare program such as this, we must recognize that the Due Process Clause can be thought to interpose a bar only if the statute manifests a patently arbitrary classification, utterly lacking in rational justification.

This standard was reaffirmed in *Richardson* v. *Belcher*, 404 U.S. 78, 84, where the Court held that "[i]f the goals sought are legitimate, and the classification adopted is rationally related to the achievement of those goals, then the action of Congress is not so arbitrary as to violate the Due Process Clause of the Fifth Amendment." In the most recent case decided under the Social Security Act, *Jimenez* v. *Weinberger*, No. 72–6609, decided June 19, 1974, the statutory classification there involved was invalidated only because the Court concluded that "[the statute] would discriminate between the two subclasses of after-born illegitimates without any basis for the distinction * * *" (slip op. 7–8).

Since, as we now show, the nine-month duration-of-marriage requirement is rationally related to a legitimate governmental interest, and does not invidiously or arbitrarily discriminate against any class, the provisions in question do not deny appellees due process of law.

The initial duration-of-marriage requirements were enacted in the 1939 Social Security Act Amendments, 53 Stat. 1360, 1377, at the same time that Congress extended monthly benefits to the dependents and survivors of insured wage-earners. Both the testimony of Dr. Altmeyer, Chairman of the Social Security Board, and the *Final Report of the Advisory Council on Social Security* (1938), which served as a basis for the 1939 Amendments, indicate that a durational requirement was considered necessary to discourage individuals from entering into relationships solely for the purpose

of acquiring enhanced benefits.[5] The rationale of these durational requirements was underscored by the 1946 Social Security Amendments, which reduced the duration-of-marriage requirement in the analogous definition of "wife" from five to three years. As the committee reports stated, this reduction was adopted because three years was considered a sufficient deterrent: "Few persons are likely to marry because of the prospect of receiving a modest insurance benefit which will not be payable until after 3 years." H. Rep. No. 2526, 79th Cong., 2d Sess., pp. 25–26. S. Rep. No. 1862, 79th Cong., 2d Sess., pp. 33–34.[6]

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[5] Hearings before the House Committee on Ways and Means, on Social Security, 76th Cong., 1st Sess., pp. 31–32 (recommendations of Advisory Council) and p. 2297 (testimony of Dr. Altmeyer). At that time, Congress adopted a five-year duration-of-marriage requirement in order for a woman to qualify for wife's benefits, and twelve-month requirements for widows and children to qualify for benefits. Sections 209(j) and (k), respectively, 53 Stat. 1377.

While the legislative history of the Amendments does not contain the data or testimony upon which either the Advisory Council or the Committees based their recommendations, that does not show that their apprehensions were unjustified. Since there is no constitutional requirement that Congress document or preserve the statistical bases for each legislative decision in anticipation of subsequent judicial review, the absence of relevant data may simply reflect that Congress was sufficiently convinced of the need for the provisions to dispense with elaborate proof.

[6] The later legislative commentary, including the 1972 House Report cited by the district court (J.S. App. p. 5a), is consistent with this preventive rationale. That report stated: "This duration-of-relationship requirement is included in the law as a *general precaution* against the payment of benefits where the marriage was undertaken to secure benefit rights." H. Rep. No. 92-231, 92d Cong., 2d Sess., p. 55 (emphasis supplied).

Congress determined that it was necessary to protect the limited resources of the Social Security Trust Fund from claims resulting from the forming of relationships for the purpose of obtaining benefits. In seeking to implement that goal—the legitimacy of which is not disputed by appellees—Congress was confronted with two basic alternatives: The establishment of (1) a prophylactic rule of uniform application, or (2) a system for inquiry on a case-by-case basis into the intent of claimants.

In adopting the duration-of-marriage requirement, Congress validly chose the prophylactic rule approach. That requirement cannot properly be characterized as an evidentiary presumption concerning intent. Indeed, intent is not relevant to eligibility for survivors benefits, *i.e.*, a claimant who admits that the marriage was contracted to obtain benefits will receive benefits if the marriage has lasted more than nine months.

The duration-of-marriage requirement rests on sound policy considerations (see pp. 15–16, *infra*) and it is rationally related to Congress' underlying purpose—the protection of the Trust Fund. The durational provision deters from marriage only those individuals motivated by the desire to obtain benefits. To the extent that individuals wish to marry for reasons unrelated to Social Security benefits, their decision would be unaffected by the prospect that a right to benefits may not automatically result from the marriage.[7]

[7] The Act contains comparable provisions intended to protect against abuse through adoption of children solely to qualify for benefits, which the courts of appeals have sustained. See, *e.g.*, *Stanton* v. *Weinberger*, 502 F. 2d 315, 320 (C.A. 10); *Hagler* v. *Finch*, 451 F. 2d 45, 48 (C.A. 9), certiorari denied, 405 U.S. 1071.

The durational requirement does not invidiously or irrationally discriminate against appellees with regard to the primary purpose of the Act—the provision of benefits on the basis of probable need for benefits because of loss of wage earner support. The requirement defines two classes for the purposes of entitlement to monthly survivors benefits: one class consists of claimants such as appellees whose marriages lasted less than nine months before the wage earners' deaths, while the other class encompasses individuals whose marriages lasted longer.

Congress could rationally conclude that the individuals in the latter class would tend to have a greater need for benefits because a greater financial dependency on the wage earner results from marriages of longer duration. Marriages which last less than nine months are, on the other hand, likely to induce a lesser degree of dependency, *e.g.*, it would be relatively easier for such individuals to reenter the work force and qualify for benefits on their own account if they had left employment less than nine months before. Paying benefits only to the widows of marriages of longer duration is therefore consistent with the congressional policy of allocating the limited monies of the Trust Fund where the probable need was greatest.[8]

[8] The Act contains many such legislative determinations of probable need which are not necessarily coextensive with the underlying legal relationships. For example, Congress provides monthly benefits for a divorced woman on the account of her former spouse even though the marriage is legally terminated at the time the woman applies for benefits. See 42 U.S.C. 402(b)(1), 42 U.S.C. 402(e)(1), 42 U.S.C. 402(g)(1).

As Congress recognized when first enacting monthly survivors benefits in 1939:

> The new plan will eliminate most lump sum benefits and will *substitute monthly benefits for those groups of survivors whose probable need is greatest.* [H. Rep. No. 728, 76th Cong., 1st Sess., p. 11; S. Rep. No. 734, 76th Cong., 1st Sess., p. 11 (emphasis supplied).] [9]

B. *The "Conclusive Presumption" Analysis Should Not Be Extended To Classifications Under the Social Security Act.*

This Court's "conclusive presumption" decisions, relied upon by the district court, are inapposite here. The instant classification neither touches upon fundamental rights (*Stanley* v. *Illinois,* 405 U.S. 645 (right to custody of one's own children)), nor is it so arbitrary as to constitute a denial of due process of law (*Vlandis* v. *Kline,* 412 U.S. 441 (residency status for university students permanently fixed by their address at time of application); *United States Department of Agriculture* v. *Murry,* 413 U.S. 508 (entire household denied food stamps for twelve months where one member was declared a tax dependent in a prior year)). Moreover, unlike the regulation involved in *Cleveland Board of Education* v. *LaFleur,* 414 U.S. 632, which may have impinged on a teacher's decision

[9] See also *A Report of the Social Security Board*, H. Doc. No. 110, 76th Cong., 1st Sess., p. 7:

"Under a social insurance system the primary purpose should be *to pay benefits in accordance with the presumptive needs of the beneficiaries*, rather than to make payments to the estate of a deceased employee regardless of whether or not he leaves dependents" (emphasis supplied).

to bear children, the durational provision does not deny benefits that an individual would have received had she not married. The durational provision would affect an individual's decision to marry only if the decision were motivated solely by the desire to receive benefits.

Furthermore, if the "conclusive presumption" doctrine were applied to the Social Security Act, the probable result would be the piecemeal invalidation of many entitlement provisions of Title II of that Act.[10] Almost every statutory entitlement provision can be recast as a "conclusive presumption" with regard to the purpose of the program to which the entitlement provision relates. Under this analysis all persons satisfying the requirements of the statute are "conclusively presumed" to fit within the purpose and, conversely, persons failing to satisfy the requirements are "conclusively presumed" to be beyond the statute's purview. Thus, many statutes would be unconstitutional because of slight variations between the "presumed" facts and those demonstrably correct.[11]

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[10] For example, duration-of-relationship requirements are incorporated in the basic definitions which determine the right to most of the monthly survivors benefits under the Act. See 42 U.S.C. 416(b) ("wife"); 42 U.S.C. 416(c) ("widow"); 42 U.S.C. 416(e) ("child"); 42 U.S.C. 416(f) ("husband"); 42 U.S.C. 416(g) ("widower").

[11] In *Vlandis* v. *Kline*, *supra*, 412 U.S. at 452, this Court held that "it is forbidden by the Due Process Clause to deny an individual the resident rates on the basis of a permanent and irrebuttable presumption of nonresidence, when that presumption is not *necessarily or universally true in fact* * * *" (emphasis supplied).

The impact of the conclusive presumptive doctrine as applied to social welfare legislation is illustrated by the possible applica-

566-535—74— —3

In a manner common to social welfare legislation, the Social Security Act sets out conditions of entitlement for specific benefits. The duration-of-marriage requirement is merely one of a myriad of bases of eligibility for benefits, such as age, relationship, earnings and current connection with the work force. The failure to meet any of these bases precludes benefits.

This does not, however, make them "conclusive presumptions" of ineligibility. Congress must and properly does draw lines for entitlement in order to allocate limited funds to competing needs. These classifications do not offend due process simply because some individuals are included and other are excluded, for this is the very nature and purpose of the conditions of entitlement. *Flemming* v. *Nestor, supra.*

The durational provision is not invalid because it may deny benefits to some persons whose marriage was not contracted to obtain benefits. "[I]f evils disclosed themselves which entitled Congress to legislate as it did, Congress had power to legislate generally, unlimited by proof of the existence of the evils in each particular situation." *North American Co.* v. *Securities and Exchange Commission,* 327 U.S. 686, 710–711.

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tion of the doctrine to the Social Security Act retirement benefits entitlement provision. Under the Act a wage-earner is not eligible for retirement benefits until age 62 (42 U.S.C. 402). Since the purpose of retirement benefits is the replacement of earnings lost through retirement, the age 62 requirement could be viewed as a "conclusive presumption" that no individual loses earnings through retirement before age 62. If the provision is so characterized, it is invalid since the "presumption" is "not necessarily or universally true in fact."

All that is required is that the classifications so drawn have some rational basis. The duration-of-marriage requirement has such a basis and thus satisfies due process requirements.

The "conclusive presumption" doctrine is contrary to the traditional standard of review which this Court has applied to the Social Security Act (see pp. 7–8, *supra*). If applied to the Act, the doctrine would result in the invalidation of provisions which employ standards for coverage that have a rational basis. Moreover, it would also effectively subject Congress to a "constitutional straightjacket" (*Jefferson* v. *Hackney*, 406 U.S. 535, 546) precluding legislative experimentation in areas marked by hard choices dictated by a limited amount of funds, where, this Court has observed, "[t]he very complexity of the problems suggests that there will be more than one constitutionally permissible method of solving them" (*id.* at 546–547).

C. *The Provisions At Issue Here Are Not Unconstitutional Under This Court's "Conclusive Presumption" Decisions.*

Even under this Court's "conclusive presumption" decisions, the nine-month duration-of-marriage requirement is not invalid. The legislative history of that requirement demonstrates that the provision is a prophylactic rule designed to protect the Trust Fund from claims arising from the manipulation of relationships. Congress made an allowable judgment when it adopted a general rule that nine months of marriage was a condition to obtaining benefits rather than providing for an evidentiary hearing in each case to determine the claimants' motivations for marriage. Such an in-

quiry would involve a substantial and traditionally-disfavored intrusion into protected areas of marital privacy.[12]

Moreover, requiring the Social Security Administration to proceed by hearings in all cases involving duration-of-relationship claims would entail additional administrative burdens and expense constituting a substantial drain on the Trust Fund. Cf. *Richardson* v. *Perales*, 402 U.S. 389, 406. Thus, there is not here, as there was in *Vlandis* v. *Kline*, *supra*, 412 U.S. at 452, a "reasonable alternative means of making the crucial determination."

II. THIS SUIT IS BARRED BY SOVEREIGN IMMUNITY INSOFAR AS IT SEEKS RETROACTIVE BENEFITS

Insofar as it seeks retroactive benefits, this suit is one against the sovereign because "the judgment sought would expend itself on the public treasury" (*Land* v. *Dollar*, 330 U.S. 731, 738, quoted with approval in *Dugan* v. *Rank*, 372 U.S. 609, 620; *Hawaii*

[12] Appellees have suggested by analogy to 42 U.S.C. 416(k) that the Secretary could hold a hearing to determine whether it was reasonable to expect that the wage earner would live for nine months at the time of the marriage. If, as appellees maintain, the purpose of the statute is to identify marriages motivated by a desire to obtain benefits, then the motivations to marry must be the object of the hearing; otherwise the procedure appellees suggest would itself contain a "conclusive presumption", *viz.*, that any marriage which occurs less than nine months before a wage earners' *expected* death was motivated by a desire to obtain benefits. Put another way, a claimant denied benefits because of husband's death was concededly imminent at the time of marriage could attack the statute as a "conclusive presumption" on the ground that it denies her the right to prove that in marrying she was not motivated by the availability of benefits.

v. *Gordon,* 373 U.S. 57, 58). Thus, unless Congress has explicitly waived sovereign immunity or this claim comes within a judicial exception to the doctrine, this suit cannot be maintained. Neither condition exists here.

The only congressional waiver of sovereign immunity is 42 U.S.C. 405(g).[13] That section is inapplicable here, however, since it provides for judicial review only "after any final decision of the Secretary made after a hearing" where review was sought within 60 days after the Secretary's final decision. This suit was not brought under Section 405(g) and the district court sustained jurisdiction only under 28 U.S.C. 1331. Section 1331 is not a waiver of sovereign immunity, but merely defines the kinds of cases over which the district courts have jurisdiction. See, *e.g., Beale* v. *Blount,* 461 F. 2d 1133, 1138 (C.A. 5); *Cotter Corporation* v. *Seaborg,* 370 F. 2d 686, 692 (C.A. 10).

Although sovereign immunity does not bar suit where an officer is acting pursuant to an unconstitutional statute, or beyond his statutory powers (*Larson* v. *Domestic & Foreign Commerce Corp.,* 337 U.S. 682, 691 n. 11, 701–702; *Malone* v. *Bowdoin,* 369 U.S. 643, 647), these exceptions do not permit a suit which would require payment of the sovereign's funds. *Larson, supra,* 337 U.S. at 691, n. 11.

[13] The other jurisdictional bases alleged in appellees' complaint (the Administrative Procedure Act, 28 U.S.C. 1361, 28 U.S.C. 1343(1), and the Fifth Amendment) do not waive sovereign immunity for purposes of recovery of retroactive benefits. In any event, the district court never considered these jurisdictional bases. Cf. *Richardson* v. *Morris,* 409 U.S. 464. Moreover, as stated above, 42 U.S.C. 405(g) is the exclusive jurisdictional base for recovery of benefits under the Act. See 42 U.S.C. 405(h).

That principle was recently reaffirmed in *Edelman* v. *Jordan*, 415 U.S. 651. *Edelman* was a class action against Illinois state officials to recover, *inter alia*, retroactive benefits under Aid to the Aged, Blind, and Disabled (AABD),[14] which had been withheld from class members when the state failed to comply with federally-imposed timetables for processing applications. This Court reversed the portion of the court of appeals' decision that permitted recovery of retroactive benefits against the State.[15] Rejecting the plaintiffs' argument that such payments amounted to "'equitable restitution'," the Court held that retroactive benefits are "in practical effect indistinguishable in many aspects from an award of damages against the State" (415 U.S. at 668), and, therefore, were barred by the sovereign immunity principle of the Eleventh Amendment.

The principles of sovereign immunity applied in *Edelman* under the Eleventh Amendment are equally applicable to suits against the United States. See *Larson* v. *Domestic & Foreign Commerce Corp.*, *supra*, and the dissenting opinion of Mr. Justice Frankfurter

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[14] AABD is a federal-state program of assistance funded equally by the state and the Department of Health, Education, and Welfare, and administered by the state. *Edelman*, *supra*, 415 U.S. at 653–654.

[15] The Court indicated in *Edelman* that prospective injunctive relief was appropriate in that case (415 U.S. at 667–668) (the point was also conceded by petitioners, *id.* at 664) to compel the state officials to comply with federal regulations for the processing of applications of welfare beneficiaries. The Court suggested that prospective relief was appropriate since the monetary consequences were "ancillary" to the substantive relief. See 415 U.S. at 668. Thus, prospective injunctive relief in this case akin to that granted in *Edelman* would not be barred by sovereign immunity.

in that case, 337 U.S. at 708.[16] Insofar as this suit seeks retroactive benefits, it is barred by sovereign immunity.

III. ANY DECISION INVALIDATING THE DURATION-OF-MARRIAGE REQUIREMENT SHOULD BE GIVEN ONLY PROSPECTIVE EFFECT.

If, contrary to our submission, this Court determines that the duration-of-marriage requirement is invalid and that sovereign immunity does not bar retroactive benefits, that decision should be given only prospective effect.[17]

This Court has long recognized that decisions holding statutes unconstitutional need not be given retroactive effect in every case. See, *e.g.*, *Chicot County Drainage District* v. *Baxter State Bank*, 308 U.S. 371. In *Chevron Oil Co.* v. *Huson*, 404 U.S. 97, this Court recently indicated three factors which must be considered in deciding whether a judicial decision—including a constitutional decision—should be given only prospective effect. Those factors are: (1) whether the decision represents a clear break with past precedent, or decides an issue of first impression whose

[16] See also 3 Davis, *Administrative Law Treatise*, § 27.02, p. 548, n. 1 (1958 ed.):

"The Eleventh Amendment creates sovereign immunity of states in certain suits in the federal courts.

"No difference is discernible in modern law between suits against states in the federal courts, and suits against the United States in federal courts. * * *"

[17] The State of Illinois also argued this point in *Edelman* v. *Jordan*, but this Court declined to reach the issue in light of its disposition on the grounds of sovereign immunity. 415 U.S. at 658–659, n. 7.

resolution was not clearly foreshadowed; (2) whether retroactive effect will promote the policies underlying the decision; and (3) whether the retroactive application will produce "substantial inequitable results." *Id.* at 106–107.

Under the tests of *Chevron Oil,* any decision invalidating the duration-of-marriage requirement should be given only prospective effect.

1. The "conclusive presumption" doctrine represents a radical departure from this Court's prior decisions concerning the standard of review of Social Security Act classifications (see pp. 7–8, *supra*). Since the traditional standard of review was applied by this Court in its most recent decision involving the Social Security Act (*Jimenez* v. *Weinberger,* No. 72–6609, decided June 19, 1974), the application of the "conclusive presumption" doctrine has not been foreshadowed by prior decisions.

2. The payment of retroactive benefits is not necessary to promote the purposes of the Act. Presented with an analogous situation in *Rothstein* v. *Wyman,* 467 F. 2d 226 (C.A. 2), certiorari denied, 411 U.S. 921, the Second Circuit applied the *Chevron Oil* factors and concluded that the State of New York should not be required to pay retroactive benefits illegally withheld from AABD recipients. The factors which led the court of appeals to deny retroactive benefits in *Rothstein* are also present here.

This is not a case where retroactive benefits are arguably justified to deter officials from calculated and flagrant violation of law. (Compare *Edelman,*

supra, 415 U.S. at 691–692, dissent of Mr. Justice Marshall.) Here, the Secretary acted in compliance with an Act of Congress which he believes to be constitutional. Moreover, payment of large lump sums of retroactive benefits does not advance the purposes of the monthly survivors benefits provisions of the Social Security Act which were designed to provide continuing support. See p. 11, *supra.* As the *Rothstein* court noted, the unfortunate consequences of that lost support "however deplorable, cannot be undone." 467 F. 2d at 234.

3. Finally, the payment of retroactive benefits would produce an inequitable result from the standpoint of operation of the Trust Fund. In this case lump sum retroactive benefits would be paid to many people no longer entitled to prospective relief because they had attained age 18, remarried, or otherwise become ineligible. Funds thus expended would not be available for payment to individuals now qualified for statutory benefits. Cf. *Rothstein* v. *Wyman, supra,* 467 F. 2d at 234.

IV. CLASS ACTION ISSUES

As set forth in our Jurisdictional Statement (pp. 12–14), the district court erred in its handling of the class suit issues in this case. Specifically, the district court's action is certifying the class and ordering the sending of notice *after* judgment is contrary to the requirements of Rule 23, Fed. R. Civ. P., and this Court's decision in *Eisen* v. *Carlisle & Jacquelin,* 417 U.S. 156.[18]

[18] Contrary to appellees' contention (motion to affirm, p. 29), the government did not waive any defects in the court's treat-

To the extent this suit seeks equitable prospective relief, *i.e.*, insofar as it challenges the constitutionality of the durational provisions, the class action issues referred to above are irrelevant since, however this Court decides the merits of this case, the decision will be binding on both the Secretary and all claimants under the Act.

Class action issues are relevant only if this Court determines that the durational provision is invalid and that there may be recovery of retroactive benefits. In that event, the district court's definition of the class must be modified to permit recovery of retroactive benefits only by persons who have satisfied the conditions of 42 U.S.C. 405(g), *i.e.*, obtaining a final denial of their claim by the Secretary after a hearing and filing suit within 60 days of the final denial.

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ment of the class action issue by stipulating that the case could be decided on summary judgment. The stipulation stated only that "[t]here are no genuine issues of material fact in dispute concerning the adjudication of the constitutionality of the challenged provision * * *" (App. 29). In any event, the court's obligation to make an early determination of the class and to require sending notice to class members does not depend on the action or inaction of a defendant.

The sending of notice after judgment is simply ineffective. Had the government prevailed below, the decision would not have bound class members who were not given notice and an opportunity to opt out of the suit. We decline to press the notice issue at this point only because the *stare decisis* effect that this Court's decision will, as a practical matter, bind all claimants under the Act.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be reversed.

Respectfully submitted.

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JANUARY 1975.

APPENDIX

42 U.S.C. 405(g) provides:

Judicial review.

Any individual, after any final decision of the Secretary made after a hearing to which he was a party, irrespective of the amount in controversy, may obtain a review of such decision by a civil action commenced within sixty days after the mailing to him of notice of such decision or within such further time as the Secretary may allow. Such action shall be brought in the district court of the United States for the judicial district in which the plaintiff resides, or has his principal place of business, or, if he does not reside or have his principal place of business within any such judicial district, in the United States District Court for the District of Columbia. As part of his answer the Secretary shall file a certified copy of the transcript of the record including the evidence upon which the findings and decision complained of are based. The court shall have power to enter, upon the pleadings and transcript of the record, a judgment affirming, modifying, or reversing the decision of the Secretary, with or without remanding the cause for a rehearing. The findings of the Secretary as to any fact, if supported by substantial evidence, shall be conclusive, and where a claim has been denied by the Secretary or a decision is rendered under subsection (b) of this section which is adverse to an individual who was a party to the hearing before the Secretary, because of failure of the claimant or such individual to submit proof in conformity with any regulation prescribed under subsection (a) of this section, the court shall review only

the question of conformity with such regulations and the validity of such regulations. The court shall, on motion of the Secretary made before he files his answer, remand the case to the Secretary for further action by the Secretary, and may, at any time, on good cause shown, order additional evidence to be taken before the Secretary, and the Secretary shall, after the case is remanded, and after hearing such additional evidence if so ordered, modify or affirm his findings of fact or its decision, or both, and shall file with the court any such additional and modified findings of fact and decision, and a transcript of the additional record and testimony upon which his action in modifying or affirming was based. Such additional or modified findings of fact and decision shall be reviewable only to the extent provided for review of the original findings of fact and decision. The judgment of the court shall be final except that it shall be subject to review in the same manner as a judgment in other civil actions. Any action instituted in accordance with this subsection shall survive notwithstanding any change in the person occupying the office of Secretary or any vacancy in such office.

42 U.S.C. 405(h) provides:

Finality of Secretary's decision.

The findings and decisions of the Secretary after a hearing shall be binding upon all individuals who were parties to such hearing. No findings of fact or decision of the Secretary shall be reviewed by any person, tribunal, or governmental agency except as herein provided. No action against the United States, the Secretary, or any officer or employee thereof shall be brought under section 41 of Title 28 to recover on any claim arising under this subchapter.

42 U.S.C. 416(c) provides:

Widow.

The term "widow" (except when used in section 402(i) of this title) means the surviving wife of an individual, but only if (1) she is the mother of his son or daughter, (2) she legally adopted his son or daughter while she was married to him and while such son or daughter was under the age of eighteen, (3) he legally adopted her son or daughter while she was married to him and while such son or daughter was under the age of eighteen, (4) she was married to him at the time both of them legally adopted a child under the age of eighteen, (5) she was married to him for a period of not less than nine months immediately prior to the day on which he died, or (6) in the month prior to the month of her marriage to him (A) she was entitled to, or on application therefor and attainment of age 62 in such prior month would have been entitled to, benefits under subsection (b), (e), or (h) of section 402 of this title, (B) she had attained age eighteen and was entitled to, or on application therefor would have been entitled to, benefits under subsection (d) of such section (subject, however, to section 402(s) of this title), or (C) she was entitled to, or upon application therefor and attainment of the required age (if any) would have been entitled to, a widow's, child's (after attainment of age 18), or parent's insurance annuity under section 228e of Title 45.

42 U.S.C. (Supp. II) 416(e) provides:

Child.

The term "child" means (1) the child or legally adopted child of an individual, (2) a stepchild who has been such stepchild for not

less than one year immediately preceding the day on which application for child's insurance benefits is filed or (if the insured individual is deceased) not less than nine months immediately preceding the day on which such individual died, and (3) a person who is the grandchild or stepgrandchild of an individual or his spouse, but only if (A) there was no natural or adoptive parent (other than such a parent who was under a disability, as defined in section 423(d) of this title) or such person living at the time (i) such individual became entitled to old-age insurance benefits or disability insurance benefits or died, or (ii) if such individual had a period of disability which continued until such individual became entitled to old-age insurance benefits or disability insurance benefits, or died, at the time such period of disability began, or (B) such person was legally adopted after the death of such individual by such individual's surviving spouse in an adoption that was decreed by a court of competent jurisdiction within the United States and such person's natural or adopting parent or stepparent was not living in such individual's household and making regular contributions toward such person's support at the time such individual died. For purposes of clause (1), a person shall be deemed, as of the date of death of an individual, to be the legally adopted child of such individual if such person was at the time of such individual's death living in such individual's household and was legally adopted by such individual's surviving spouse after such individual's death but only if (A) proceedings for the adoption of the child had been instituted by such individual before his death, or (B) such child was adopted by such individual's surviving spouse before the end of two years after (i) the day on which such individual died or

(ii) August 28, 1958; except that this sentence shall not apply if at the time of such individual's death such person was receiving regular contributions toward his support from someone other than such individual or his spouse, or from any public or private welfare organization which furnishes services or assistance for children. For purposes of clause (2), a person who is not the stepchild of an individual shall be deemed the stepchild of such individual if such individual was not the mother or adopting mother or the father or adopting father of such person and such individual and the mother or adopting mother, or the father or adopting father, as the case may be, of such person went through a marriage ceremony resulting in a purported marriage between them which, but for a legal impediment described in the last sentence of subsection (h)(1)(B) of this section, would have been a valid marriage.

42 U.S.C. (Supp. II) 416(k) provides:

Waiver of nine-month retirement for widow, stepchild, or widower in case of accidental death or in case of serviceman dying in line of duty, or in case of remarriage to the same individual.

The requirement in clause (5) of subsection (c) of this section or clause (5) of subsection (g) of this section that the surviving spouse of an individual have been married to such individual for a period of not less than nine months immediately prior to the day on which such individual died in order to qualify as such individual's widow or widower, and the requirement in subsection (e) of this section that the stepchild of a deceased individual have been such stepchild for not less than nine months immediately preceding the day on which such individual died in order to qualify as such individual's

child, shall be deemed to be satisfied, where such individual dies within the applicable nine-month period, if—

(1) his death—

(A) is accidental, or

(B) occurs in line of duty while he is a member of a uniformed service serving on active duty (as defined in section 410(*l*)(2) of this title), unless the Secretary determines that at the time of the marriage involved the individual could not have reasonably been expected to live for nine months, or

(2)(A) the widow or widower of such individual had been previously married to such individual and subsequently divorced and such requirement would have been satisfied at the time of such divorce if such previous marriage had been terminated by the death of such individual at such time instead of by divorce; or

(B) the stepchild of such individual had been the stepchild of such individual during a previous marriage of such stepchild's parent to such individual which ended in divorce and such requirement would have been satisfied at the time of such divorce if such previous marriage had been terminated by the death of such individual at such time instead of by divorce;

except that paragraph (2) of this subsection shall not apply if the Secretary determines that at the time of the marriage involved the individual could not have reasonably been expected to live for nine months. For purposes of paragraph (1)(A) of this subsection, the death of an individual is accidental if he receives bodily injuries solely through violent, external, and accidental means and, as a direct result of the bodily injuries and independently of all other causes, loses his life not later than three months after the day on which he receives such bodily injuries.

U.S. GOVERNMENT PRINTING OFFICE: 1978